

FISA Fact Check:

Setting The Record Straight On Speaker Pelosi

Despite Speaker Pelosi's Misleading Claims, FISA Is No Substitute For The Bipartisan Senate Bill; Speaker Pelosi's Continued Refusal To Permit A Vote On The Senate Bill Is Weakening Our Ability To Protect The Country From Terrorist Attack

House Speaker Nancy Pelosi claims that "under FISA, the Attorney General can approve surveillance in minutes. Surveillance can begin immediately and approval of the FISA Court can be obtained within three days." (Nancy Pelosi, "Statement On FISA Negotiations," 2/22/08)

- **Contrary to Speaker Pelosi's misleading statement, FISA's requirements, unlike those of the Protect America Act and the bipartisan Senate bill, impair our ability to collect information on foreign intelligence targets located overseas.** In their letter to the House Permanent Select Committee Chairman Silvestre Reyes, Attorney General Michael Mukasey and Director of National Intelligence (DNI) Mike McConnell explained, "FISA was designed to govern foreign intelligence surveillance of persons in the United States and therefore requires a showing of 'probable cause' before such surveillance can begin. ... The process of compiling the facts necessary for such a determination and preparing applications for emergency authorizations [approved by the Attorney General] takes time and results in delays." (Attorney General Michael Mukasey and Director Of National Intelligence Mike McConnell, Letter To Chairman Of The House Permanent Select Committee On Intelligence, 2/22/08)
- **Attorney General Mukasey and DNI McConnell also explained that "our intelligence professionals need to be able to obtain foreign intelligence from foreign targets with speed and agility."** "If we revert to a legal framework in which the Intelligence Community needs to make probable cause showings for foreign terrorists and other national security threats located overseas, we are certain to experience more intelligence gaps and miss collecting information."
- **Attorney General Mukasey and DNI McConnell further explained that "because of the hurdles under FISA's emergency authorization provisions and the requirement to go to the FISA Court within 72 hours, our resource constraints limit our use of emergency authorizations to certain high-priority circumstances and cannot simply be employed for every foreign intelligence target."**

Speaker Pelosi also misleadingly states that "the FISA Court can approve surveillance orders quickly." (Nancy Pelosi, "Statement On FISA Negotiations," 2/22/08)

- **Attorney General Mukasey and DNI McConnell have made clear that the FISA Court requires a showing of probable cause before it will authorize surveillance and satisfying the probable cause requirement will result in unacceptable gaps and delays in monitoring communications of foreign terrorists overseas.** "Imposing this requirement in the context of surveillance of foreign targets located overseas results in the loss of potentially vital intelligence by, for example, delaying intelligence collection and thereby losing some

intelligence forever." (Attorney General Michael Mukasey and Director Of National Intelligence Mike McConnell, Letter To Chairman Of The House Permanent Select Committee On Intelligence, 2/22/08)

- **Attorney General Mukasey and DNI McConnell also stated that "it makes no sense to require a showing of probable cause for surveillance of overseas foreign targets who are not entitled to the Fourth Amendment protections guaranteed by our Constitution."** "[Probable cause] makes sense in the context of targeting persons in the United States for surveillance, where the Fourth Amendment itself often requires probable cause and where the civil liberties of Americans are most implicated."

Speaker Pelosi misleadingly asserts that "there is no backlog of cases to slow down getting surveillance approvals from the FISA court." (Nancy Pelosi, "Statement On FISA Negotiations," 2/22/08)

- **Attorney General Mukasey and DNI Mike McConnell reported, "we have lost intelligence information this past week as a direct result of the uncertainty created by Congress' failure to act."** (Attorney General Michael Mukasey and Director Of National Intelligence Mike McConnell, Letter To Chairman Of The House Permanent Select Committee On Intelligence, 2/22/08)
- **The Intelligence Community and Department of Justice have worked over the past week with our private partners – whose assistance is essential to our intelligence collection efforts – to mitigate this problem caused by Congress' failure to act, but we have nonetheless missed intelligence information that we could have been collecting to protect the country.** "We appreciate the willingness of our private partners to cooperate despite the uncertainty [caused by Congress' failure to pass long-term FISA modernization]. Unfortunately, the delay resulting from [efforts to gain the cooperation of the private sector after Congress failed to act] impaired our ability to cover foreign intelligence targets, which resulted in missed intelligence information." (Department of Justice and Office of The Director Of National Intelligence, Statement Regarding Cooperation With Private Partners, 2/23/08)

Speaker Pelosi also misleadingly claims "under FISA, telecommunications companies can be compelled by the FISA court to help with surveillance and have legal protection for compliance." (Nancy Pelosi, "Statement On FISA Negotiations," 2/22/08)

- **The Attorney General and Director of National Intelligence explained that, "[e]ven prior to the expiration of the Protect America Act, we experienced significant difficulties in working with the private sector because of the continued failure to provide liability protection for such companies."** "These difficulties have only grown since expiration of the Act without passage of the bipartisan Senate bill, which would provide fair and just liability protection. Exposing the private sector to the continued risk of billion-dollar class action suits for assisting in efforts to defend the country understandably makes the private sector much more reluctant to cooperate. Without their cooperation, our efforts to protect the country cannot succeed." (Attorney General Michael Mukasey and Director Of National Intelligence Mike McConnell, Letter To Chairman Of The House Permanent Select Committee On Intelligence, 2/22/08)
- **According to a statement from the Department of Justice and the Office of the Director of National Intelligence: "[A]lthough our private partners are cooperating for the time being, they have expressed understandable misgivings about doing so in light of the**

on-going uncertainty and have indicated that they may well discontinue cooperation if the uncertainty persists. "Even with the cooperation of these private partners under existing directives, our ability to gather information concerning the intentions and planning of terrorists and other foreign intelligence targets will continue to degrade because we have lost tools provided by the Protect America Act that enable us to adjust to changing circumstances." (Department of Justice and Office of The Director Of National Intelligence, Statement Regarding Cooperation With Private Partners, 2/23/08)

- **As our Nation's intelligence professionals have explained, "other intelligence tools [like FISA] simply cannot replace these Protect America Act authorities. The bipartisan Senate bill contains these authorities, as well as liability protection for those companies who answered their country's call in the aftermath of September 11."** (Department of Justice and Office of the Director Of National Intelligence, Statement Regarding Cooperation With Private Partners, 2/23/08)